

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 20, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2337

Cir. Ct. No. 2011CV4595

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

KATHLEEN M. DERMODY,

PETITIONER-APPELLANT,

V.

COMMISSIONER OF INSURANCE,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
MARYANN SUMI, Judge. *Affirmed.*

Before Blanchard, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Kathleen Dermody appeals an order denying a motion for reconsideration of a circuit court order that affirmed a decision of the Commissioner of Insurance. The Commissioner suspended Dermody's license to sell insurance for six months and ordered that Dermody pay a forfeiture for

making false representations and statements under oath. For the reasons set forth below, we affirm the order of the circuit court.

BACKGROUND

¶2 In April 2010, the Office of the Commissioner of Insurance issued a notice of hearing, alleging that Kathleen Dermody had falsely represented that she had made seventeen sales of insurance policies, when her husband was the person who actually made the sales at a time when his insurance license had been revoked. After a hearing, an administrative law judge (ALJ) issued a proposed order dated June 2, 2011, which was adopted by the Commissioner in a final decision dated August 18, 2011. The final decision ordered that Dermody's permanent intermediary's license be suspended for six months, pursuant to WIS. STAT. § 628.10(2)(b) (2011-12),¹ and that she pay a forfeiture of \$2000 for violations of WIS. STAT. § 628.34(1).

¶3 Dermody petitioned the circuit court to review the Commissioner's decision. After briefing and oral argument, the circuit court entered an order on July 6, 2012, affirming the Commissioner's decision. Dermody filed a motion for reconsideration, which the circuit court denied in an order dated October 19, 2012, after briefing and oral argument. Dermody filed a notice of appeal on October 23, 2012. On December 10, 2012, we issued an order stating that we lacked jurisdiction to review the July 6, 2012 order because the notice of appeal was not filed within forty-five days of the notice of entry of judgment given with regard to the July 6, 2012 order. *See* WIS. STAT. RULE 809.10(1)(e), WIS. STAT.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

§§ 806.06(5), 808.04. Our order of December 10, 2012, also directed the parties to address, as the first issue in their appellate briefs, whether this court has jurisdiction to review the reconsideration order.

DISCUSSION

¶4 It is undisputed that the notice of appeal filed by Dermody on October 23, 2012, was untimely to appeal the circuit court order dated July 6, 2012. The question, then, is whether Dermody's reconsideration motion raised a new issue that was not disposed of by the original order of July 6, 2012. *See Ver Hagen v. Gibbons*, 55 Wis. 2d 21, 25, 197 N.W.2d 752 (1972). No right to appeal exists from a motion for reconsideration which presents the same issues as those determined in the order or judgment sought to be reconsidered. *See Silverton Enters., Inc. v. General Cas. Co.*, 143 Wis. 2d 661, 665, 422 N.W.2d 154 (Ct. App. 1988).

¶5 Dermody contends that her reconsideration motion raised issues not disposed of by the original order. We disagree. Upon reviewing both the July 6, 2012 order and Dermody's arguments on reconsideration, we agree with the Commissioner that Dermody's motion for reconsideration raised the same issues as those that had already been determined by the court in its original order.

¶6 Dermody argued in her motion for reconsideration that the record did not contain substantial evidence to support the ALJ's determination that Elayne and Lyle Bolender were more credible than Dermody and her husband on the question of whether Dermody was present at the Bolenders' home on the date that annuity sales were made to the Bolenders. Dermody further argued that the Commissioner erred in denying her request to reopen the record to allow her to supplement it with information contained in an affidavit submitted after the

hearing in front of the ALJ. Both of these issues were addressed and decided in the court's July 6, 2012 order. The circuit court began the decision section of its July 6, 2012 order by stating: "The parties agree that this case presents two issues for review: (1) whether substantial evidence supports the Commissioner's findings of fact with respect to the Bolender transactions; and (2) whether the Commissioner improperly denied Kathleen Dermody's post-hearing request to supplement the record."

¶7 Dermody focuses on the first issue, the "substantial evidence" issue, on appeal. A review of the circuit court order dated July 6, 2012, indicates that the court decided that issue and, in doing so, referenced specific findings from the ALJ's decision. The court quoted the ALJ's findings that there had been eighteen to twenty inches of snow on January 28, 2010, that Dermody did not accompany her husband to the Bolender home that day, that Dermody signed the Bolender policy applications and related forms dated January 28, 2010, and that she falsely represented that she had presented the policies to the Bolenders on that date. The ALJ supported these findings with citations to the record. In particular, the ALJ cited portions of the Dermody's testimony and the Bolenders' testimony, which were inconsistent with one another. The ALJ found the Dermody's testimony not to be credible. The circuit court acknowledged in its order that this case "turns on the ALJ's assessment of the relative credibility of each of the four witnesses" and stated that it was obvious from the ALJ's findings that the ALJ had considered the complete testimony of the witnesses, including prior deposition testimony. The court resolved conflicts in the testimony against Dermody.

¶8 In light of the analysis by the circuit court, we cannot agree with the argument in Dermody's briefs that the court's July 6, 2012 order did not address the issue of whether there was substantial evidence in the record to support the

findings of the ALJ on the issue of Dermody's credibility. At best, Dermody's arguments on reconsideration could be viewed as highlighting particular factual points related to the "substantial evidence" argument rejected by the circuit court in its original order. Because the reconsideration motion addressed the same issues as those decided by the circuit court in its order of July 6, 2012, the order denying the reconsideration motion is not appealable, and we affirm the circuit court on that basis. *See Silvertown Enters., Inc.*, 143 Wis. 2d at 665.

¶9 Even if we were to reach the merits of Dermody's arguments on appeal, we still would affirm the October 11, 2012 order of the circuit court because Dermody's evidentiary discussion is not comprehensive but, instead, focuses narrowly on evidentiary points that Dermody argues should have been interpreted differently. As the circuit court recognized in its original order, the interpretation of evidence in this case depended heavily on weighing the credibility of the witnesses. The credibility of the witnesses and the persuasiveness of their testimony are for the administrative agency, and not the courts, to determine. *City of Oak Creek v. PSC*, 2006 WI App 83, ¶13, 292 Wis. 2d 119, 716 N.W.2d 152.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

